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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JEFFREY ALLEN WOOD, Appellant.	2 CA-CR 2011-0193 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093952001

Honorable John S. Leonardo, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, Jeffrey Wood was convicted of aggravated assault, causing temporary but substantial disfigurement, for which the trial court sentenced him

to ten years' imprisonment. On appeal, Wood argues the court erred in admitting his post-arrest statement under the public-safety exception to the *Miranda*[1] requirement, denying certain jury instructions, giving certain "nonstandard" jury instructions, and precluding him from impeaching the victim's testimony at trial. Finding no error, we affirm.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). In September 2008, B.S. was an inmate at the Arizona Department of Corrections. While attending a creative writing class, he left the classroom to use the restroom. In the hallway, B.S. was accosted by Wood, also an inmate, who "pummel[ed]" him repeatedly in the face while calling him a "dirty Jew" and other epithets. Wood eventually returned to the classroom.

¶3 Corrections Officer Fairchild discovered B.S. "huddled in the corner" with "blood everywhere in the hallway." Another officer initiated a general alert and tended to B.S. while Fairchild immediately examined inmates in the classroom for signs they had been involved in the assault. Fairchild noticed blood on Wood's shoes and pants, and she removed him from the classroom, handcuffed him, and asked, "[W]hat is going on?" Wood replied that he was the only one involved in the assault on B.S.

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

¶4 B.S.'s injuries were extensive and included fractures to his nose and eye sockets, a severed olfactory nerve, and damage to the optic nerve and musculature of his right eye. Wood was charged, convicted, and sentenced as outlined above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Public-Safety Exception

¶5 Wood first argues the trial court erroneously admitted into evidence his statement to Fairchild under the public-safety exception to the *Miranda* requirement. We review the trial court's ruling for an abuse of discretion, considering only the evidence presented at the suppression hearing and viewing the facts in the light most favorable to upholding the ruling. *State v. Szpyrka*, 220 Ariz. 59, ¶ 2, 202 P.3d 524, 526 (App. 2008).

¶6 *Miranda* warnings are required when a suspect is in custody and under interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980); *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966); *Szpyrka*, 220 Ariz. 59, ¶ 4, 202 P.3d at 526. The warnings are not required, however, in "a situation in which police officers ask questions reasonably prompted by a concern for the public safety" rather than "solely to elicit testimonial evidence from a suspect." *New York v. Quarles*, 467 U.S. 649, 656, 659 (1984); *see State v. Ramirez*, 178 Ariz. 116, 123-24, 871 P.2d 237, 244-45 (1994); *State v. Vickers*, 159 Ariz. 532, 538-39, 768 P.2d 1177, 1183-84 (1989).

¶7 In *Ramirez*, police discovered the defendant inside a bloodstained apartment and, believing there was another suspect inside, asked the defendant several

questions without first reading him his *Miranda* rights. 178 Ariz. at 119-20, 123-24, 871 P.2d at 240-41, 244-45. Our supreme court held his answers were admissible under the public-safety exception, reasoning that the officers' questions "were geared toward eliciting information that the police needed to protect themselves and anyone else in the apartment." *Id.* at 124, 871 P.2d at 245. Likewise, in *Vickers*, the court affirmed admission of the defendant's incriminating response to officers' questions about what had happened when responding to a fire the defendant-inmate had started in prison. 159 Ariz. at 537-39, 768 P.2d at 1182-84.

¶8 Here, Fairchild testified she had discovered B.S. after the assault and "[t]here was blood everywhere, [and B.S.] wasn't able to speak." She went into the classroom and "had all inmates line up against the wall" to determine who had been involved. After observing blood on Wood's clothing and that his hands were shaking, she removed him from the classroom and handcuffed him in the hallway. She asked him, "[W]hat's going on?" and Wood responded, "I was the only one." Fairchild replied, "[C]ome on, you couldn't be the only one," and Wood answered, "I was the only one, Fairchild[;] I did it." Fairchild testified she had not read Wood the *Miranda* warnings.

¶9 The trial court correctly applied the public-safety exception and therefore did not abuse its discretion in admitting Wood's statements. Fairchild explained that her purpose in questioning Wood was to determine who else may have been involved in order to ensure the safety of the other corrections officers. *See Ramirez*, 178 Ariz. at 124, 871 P.2d at 245; *cf. State v. Londo*, 215 Ariz. 72, ¶¶ 7, 11, 158 P.3d 201, 204, 205 (App. 2006) (defendant's statements admissible under rescue doctrine despite lack of *Miranda*

warnings where officer responding to what he reasonably perceived as medical emergency). Fairchild also stated she had asked Wood no further questions because she was a corrections officer and criminal investigation within the prison was the responsibility of another unit comprised of peace officers.

¶10 Wood contends the trial court applied an erroneous legal standard by basing its ruling on Fairchild's subjective motivations. But the court found the questioning "was reasonably prompted by a concern for the safety of the other guards, the voluntary teacher and the other inmates." The court therefore based its conclusion on its determination that Fairchild's motivations were objectively "reasonabl[e]." *See Ramirez*, 178 Ariz. at 123-24, 871 P.2d at 244-45 (exception applied when police operating under uncertainty in dangerous situation).

¶11 But, even had the court based its ruling on Fairchild's subjective motivations, this would not provide grounds for reversal because the evidence supports the conclusion that Fairchild's motivation was nonetheless objectively reasonable. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (ruling may be affirmed if correct for any reason). When Fairchild questioned Wood, it was not yet clear the emergency had ended because it was unknown whether Wood had been the only one involved in the attack. And, even after Fairchild had questioned Wood, other corrections officers still were responding to the scene and searching inmates. Viewing the evidence in the light most favorable to the trial court's ruling, we conclude it properly could find the emergency was ongoing when Fairchild questioned Wood and that his responses to

her questions were admissible under the public-safety exception. We see no abuse of discretion. *See Szpyrka*, 220 Ariz. 59, ¶ 2, 202 P.3d at 526.

Jury Instructions

¶12 Wood also argues the trial court erroneously instructed the jury by denying his request for a *Willits* instruction,[2] denying instructions on self-defense, and giving nonstandard instructions. A defendant is entitled to a jury instruction on any theory of the case reasonably supported by the evidence. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). The decision to give or refuse a jury instruction is reviewed for an abuse of discretion, *id.*, but whether an instruction properly states the law is reviewed de novo, *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). We address Wood's arguments in turn.

Willits Instruction

¶13 When the state has destroyed, lost, or failed to preserve physical evidence relating to a fact at issue, a *Willits* instruction permits a jury to infer the fact is against the state's interest. *State v. Willits*, 96 Ariz. 184, 187, 191, 393 P.2d 274, 276, 279 (1964). "A defendant is entitled to a *Willits* instruction if (1) the state failed to preserve accessible material evidence that might have been exculpatory, and (2) there was resulting prejudice." *State v. Lang*, 176 Ariz. 475, 484, 862 P.2d 235, 244 (App. 1993). However, a trial court does not abuse its discretion by denying the instruction "when a defendant

[2]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

fails to establish that the lost evidence would have had a tendency to exonerate him." *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999).

¶14 Here, the trial court denied Wood's pretrial motion to dismiss based on the state's loss of Wood's blood-spattered uniform and shoes, stating it would nonetheless consider giving a *Willits* instruction "at the time of trial." Wood requested the instruction on the second day of trial but did not explain how the pants and shoes might have exonerated him. The court refused the request, finding that the missing evidence had no tendency to exonerate him and its absence was not prejudicial given Wood's admission that the assault occurred. *See Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93. We agree.

¶15 Even assuming, arguendo, the blood on Wood's uniform and shoes did not belong to B.S., the absence of this fact at trial was not prejudicial because Wood had admitted to the assault. And, to the extent Wood claims there had been no blood on the uniform or shoes, suggesting that B.S. orchestrated the event or worsened his injuries after being struck, the absence of the clothing nevertheless is not prejudicial because photographs of the blood-spattered uniform and shoes taken minutes after the assault were admitted into evidence. Furthermore, two witnesses testified they had seen blood on Wood's pants and shoes. Accordingly, we agree with the state that the trial court did not abuse its discretion in refusing to instruct the jury pursuant to *Willits*.

Self-Defense Instruction

¶16 In determining whether a defendant is entitled to a self-defense instruction, "the sole question is whether a reasonable person in the defendant's circumstances would have believed that physical force was 'immediately necessary to protect himself.'" *State*

v. King, 225 Ariz. 87, ¶ 12, 235 P.3d 240, 243 (2010), *quoting* A.R.S. § 13-404(A). An instruction is appropriate if the record contains the "'slightest evidence'" that the defendant acted in self-defense. *Id.* ¶ 14, *quoting State v. Lujan*, 136 Ariz. 102, 104, 664 P.2d 646, 648 (1983). The "slightest evidence" is defined as "'a hostile demonstration, which may be reasonably regarded as placing the accused apparently in imminent danger of losing [his] life or sustaining great bodily harm.'" *Lujan*, 136 Ariz. at 104, 664 P.2d at 648, *quoting State v. Wallace*, 83 Ariz. 220, 223, 319 P.2d 529, 531 (1957). There is no requirement that self-defense must have been the defendant's sole motivation. *King*, 225 Ariz. 87, ¶ 12, 235 P.3d at 243.

¶17 Wood concedes that "no direct evidence was produced [showing that he] acted in self-defense when he struck [B.S.]" but argues, as he did below, that certain circumstantial evidence supports this inference. He contends B.S.'s testimony was unreliable, claiming it contradicted the physical evidence, the testimony of law enforcement and medical witnesses, and his own prior statements. He further argues that B.S. was motivated to pick a fight and get severely injured to manufacture grounds to sue the Arizona Department of Corrections. And Wood points out that he expressed concern for B.S.'s wellbeing when he said, "I didn't mean to hurt him," raising an inference that Wood "was responding to an attack initiated by [B.S.] and did not mean to cause so much physical damage in the course of defending himself."

¶18 We agree with the trial court that these arguments do not merit a self-defense instruction. As the state points out and the record confirms, there is no evidence that B.S. initiated or provoked the assault. Nor did Wood say anything to any prison

official about B.S. attacking him. And we disagree that the reasonable inferences from the circumstantial evidence cited by Wood, much of which is based on immaterial inconsistencies in B.S.'s testimony, amount to the "slightest evidence," *King*, 225 Ariz. 87, ¶ 14, 235 P.3d at 243, that "a reasonable person would believe that physical force [wa]s immediately necessary to protect [Wood] against [B.S.]'s use or attempted use of unlawful physical force," § 13-404(A). The trial court correctly characterized Wood's self-defense argument as "pure speculation." *Cf. King*, 225 Ariz. 87, ¶¶ 16-18, 235 P.3d at 243-44 (instruction supported by evidence defendant attacked victim in response to victim throwing bottle at defendant without provocation). The court did not abuse its discretion in denying a self-defense instruction.

Nonstandard Instructions

¶19 Wood next argues the trial court erred in giving nonstandard instructions that "erroneously commented on the evidence and undermined the role of counsel." "We review de novo whether jury instructions correctly state the law, 'read[ing] the[m] as a whole to ensure that the jury receives the information it needs to arrive at a legally correct decision.'" *State v. Prince*, 226 Ariz. 516, ¶ 77, 250 P.3d 1145, 1165 (2011) (citation omitted), *quoting State ex rel. Thomas v. Granville*, 211 Ariz. 468, ¶ 8, 123 P.3d 662, 665 (2005) (first alteration in *Prince*). "If the instructions 'are substantially free from error, the defendant suffers no prejudice by their wording,'" and we will not reverse a conviction based on the instructions unless, taken as a whole, they misled the jurors. *State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994), *quoting State v. Walton*, 159 Ariz. 571, 584, 769 P.2d 1017, 1030 (1989).

¶20 Wood first challenges instruction number one, regarding the jury's duty to determine the facts. The jury was instructed, in relevant part:

> It is . . . your duty to determine the facts only from the evidence produced in Court. When I say evidence, I mean the testimony of witnesses and the exhibits that have been introduced during the trial. You must not speculate or guess about any fact. You must not be influenced by sympathy or prejudice and you should not be concerned with any opinion you may feel I have about the facts. You are the sole judges of the facts.

Wood argues the instruction was incomplete because it did not advise the jury it could find facts by drawing reasonable inferences from the evidence. He contends this prejudiced him because his defense was based entirely on circumstantial evidence.

¶21 Viewing this instruction in light of the instructions as a whole, we see no possibility that the jury was misled. First, as Wood concedes, the instruction correctly states the law. Second, as the state points out, the jury also was instructed on circumstantial evidence, in part:

> Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

We agree with the state that this sufficiently informed the jury it could "find facts by drawing reasonable inferences from the evidence." The trial court did not err in giving instruction number one.

¶22 Wood also challenges the trial court's instruction number two, relating to the role of counsel. The jury was charged:

> Nothing said or done by the lawyers who have tried this case is to be considered by you as evidence of any fact. Opening statements of the lawyers are intended to give you a brief outline of what each side expects to prove so that you may better understand the evidence. The closing arguments are often very helpful in refreshing your recollection as to the evidence. However, your verdict should be based not upon the lawyers' statements[,] but upon the evidence.
>
> The function of the lawyers is to point out those things that they consider to be most significant. And in doing so[,] to call your attention to certain facts or inferences that might otherwise escape your notice. What the lawyers say is not binding upon you. If your memory of the evidence differs from what the lawyers have represented it to be, it is your memory that controls. If you believe that the law as represented by the attorneys differs from the law as given by the Court, it is the Court's instructions on the law that control.

The instruction, he argues, "cast[] doubt on statements of the attorneys" and consequently "improperly limited the jury's consideration of the argument of defense counsel." But Wood does not explain how the instruction improperly limited the jury's consideration; nor does he argue the instruction misstates the law. With respect to his argument that the instruction "undermined the role of defense counsel in discussing the evidence and arguing all reasonable inferences from the evidence that favor acquittal," we disagree.

¶23 As discussed above, the jury was adequately instructed that it could draw reasonable inferences from the evidence. It therefore was not directed, as Wood suggests, to ignore the inferences advanced by defense counsel. Rather, it was instructed that where an attorney's argument conflicted with the jurors' memories of the evidence, jurors were not to supplant their own memories with the attorney's argument. Similarly, the jury was instructed that where an attorney's statements of the law differed from the

court's, the jury was to follow the law as given by the court. Accordingly, instruction number two did not mislead the jury, and the trial court did not abuse its discretion in giving it.

¶24 Wood also argues the trial court's instruction number fifteen, relating to circumstantial evidence, misstated the law and violated the Arizona Constitution. Specifically, Wood challenges the portion that reads: "[B]efore you decide that a fact has been proven by circumstantial evidence, you must consider all the evidence in light of reason, experience and common sense." Wood contends, as he did below, that the instruction "stress[es] the amount of proof needed to find a fact based on circumstantial evidence."[3] He argues for the first time on appeal, however, that the instruction was "legally incorrect" because it violated the constitutional requirement that the court refrain from commenting on the evidence. Ariz. Const. art. VI, § 27. To the extent the argument was not raised below, we review it only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶25 "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Ariz. Const. art. VI, § 27. A court violates this prohibition when it "'interfere[s] with the jury's independent evaluation of th[e] evidence.'" *State v. Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d 368, 388 (2006), *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998). We find no such

[3]Wood conceded to the trial court that the instruction accurately reflected the law and argued only that it was improper to highlight the jury's duty to consider circumstantial evidence "in light of reason, experience and common sense" without highlighting the same duty with respect to direct evidence.

interference here. In addition to the challenged portion of instruction number fifteen, the trial court also instructed the jury:

> In deciding the facts of this case you need not accept all the evidence as true or accurate. *You as the jurors are the sole judges of the credibility of a witness and the weight of the evidence.* The credibility of a witness means the extent to which you believe the witness. The weight of the evidence means the extent to which you are or are not convinced by the evidence.

(Emphasis added.) And, as noted above, the court instructed, "[Y]ou should not be concerned with any opinion you may feel I have about the facts." Finally, the court also charged the jurors to "[c]onsider *all the evidence* in the light of reason, common sense and experience." (Emphasis added.) Thus, when considered in light of the jury instructions as a whole, the challenged instruction did not mislead the jury. *See Gallegos*, 178 Ariz. at 10, 870 P.2d at 1106. Accordingly, we find no error, much less fundamental error, on this basis. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

Cross-Examination

Impeachment

¶26 Wood next argues the trial court erroneously precluded him from impeaching B.S.'s testimony with evidence of the nature of his conviction, even after B.S. testified that he finds violence "disgusting" and "abhorrent." We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004); *State v. Montaño*, 204 Ariz. 413, ¶ 66, 65 P.3d 61, 74 (2003).

¶27 Rule 609(a), Ariz. R. Evid., permits impeachment of a witness with a prior criminal conviction "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, and if the crime (1) was punishable by . . . imprisonment in excess of one year . . . or (2) involved dishonesty or false statement, regardless of the punishment." Arizona law permits the nature of the conviction to be "sanitized" as a means of limiting its prejudicial effect. *Montaño*, 204 Ariz. 413, ¶ 66, 65 P.3d at 74.

¶28 The trial court denied Wood's request, citing Rule 403, Ariz. R. Evid. By excluding evidence of the nature of the conviction under that rule, the trial court necessarily found that "its probative value [wa]s substantially outweighed by the danger of unfair prejudice." *Id.* This satisfied the balancing requirement of Rule 609(a), which would have allowed the evidence only if the court had determined "the probative value of admitting th[e] evidence outweigh[ed] its prejudicial effect."

¶29 We cannot say that this determination was an abuse of discretion. As the state points out, the defense was able to present substantial impeaching evidence to the jury regarding B.S.'s past dishonesty. For example, Wood impeached B.S. with his federal conviction for "conspiracy to obtain controlled substances by fraud or deceit" as well as the sterilized fact of his state conviction. Wood also presented testimony of a former acquaintance of B.S. that he was not "capable of being honest" and used dishonesty to obtain what he wanted. In light of this evidence, and in light of the potential prejudicial effect of revealing B.S.'s conviction of conspiracy to commit first-

degree murder, we cannot say the trial court abused its discretion in excluding the evidence.

Confrontation

¶30 Wood also argues that precluding the evidence violated his confrontation rights under the Sixth and Fourteenth Amendments to the United States Constitution. In response, the state contends Wood did not make this argument in the trial court and therefore has forfeited review for all but fundamental, prejudicial error. In his reply brief, Wood asserts he properly preserved the issue for appeal, arguing that although "no talismanic incantation of the Sixth Amendment was made in the middle of trial," the court was fully aware of the legal grounds for his request to impeach B.S. with the nature of his conviction.

¶31 At trial, after the state's direct examination of B.S., Wood's attorney addressed the court in a bench conference, stating: "Based on [the prosecutor's] question of [B.S.] and his answer that he abhors violence, I would ask to be allowed to impeach him as to the nature of his prior conviction." The court denied the request, ruling that the matter was "collateral" and excludable pursuant to Rule 403. We agree with the state that Wood's request under Rule 609(a), standing alone, was insufficient to preserve his confrontation argument. *See State v. Alvarez*, 213 Ariz. 467, ¶¶ 6-7, 143 P.3d 668, 670 (App. 2006) (objection to testimony solely on evidentiary ground of hearsay insufficient to preserve confrontation argument); *cf. State v. King*, 212 Ariz. 372, ¶ 14, 132 P.3d 311, 314 (App. 2006) (though Confrontation Clause not mentioned, confrontation argument preserved where counsel explicitly objected based on inability to cross-examine absent

witness). Because Wood did not invoke the Confrontation Clause, even inferentially, and because the trial court gave no indication it was considering or ruling pursuant to that principle, we cannot assume the court was "fully aware" that the request was rooted in Wood's confrontation rights as well as in Rule 609(a). We therefore review the confrontation argument for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶32 However, because Wood has failed to argue that the alleged error here was fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

Disposition

¶33 For the foregoing reasons, Wood's conviction and sentence are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge